

**No. PD-0574-19**

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**IN THE TEXAS COURT OF CRIMINAL APPEALS**

FILED  
COURT OF CRIMINAL APPEALS  
3/22/2021  
DEANA WILLIAMSON, CLERK

**AT AUSTIN, TEXAS**

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**ADRIAN VALADEZ, Appellant**

**v.**

**THE STATE OF TEXAS**

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**APPELLANT'S BRIEF ON DISCRETIONARY REVIEW**

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**ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DECISION BY THE TENTH COURT OF APPEALS  
IN CAUSE NUMBER 10-17-00161-CR**

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## Statement of the Case

Adrian Valadez was indicted by a McLennan County grand jury for the third degree felony offense of possession of marihuana in an amount of over five pounds and under 50 pounds (CR 6). *See* TEX. HEALTH & SAFETY CODE §§ 481.121(a) and 481.121(b)(4). After Valadez entered a plea of not guilty to the indicted offense, a jury found him guilty of the offense alleged in the indictment (4 RR 243, CR 84 and 6 RR 43).

Punishment was tried to the jury (7 RR). Punishment was assessed at five years and a fine of \$8500.00 (CR 95 and 7 RR 63). The jury did not recommend community supervision (CR 95 and 7 RR 63).

The trial court certified Valadez's right to appeal (CR 105). Notice of appeal was timely filed (CR 112).

On May 15, 2019, the Tenth Court of Appeals affirmed Valadez's conviction. *Valadez v. State*, 2019 WL 2147625 (Tex. App.—Waco 2019, pet. granted). No motion for rehearing was filed.

Valadez filed his petition for discretionary review from the decision by the court of appeals in PD-0574-19. The petition was granted by this court on February 3, 2021. Valadez now files his brief in support of his petition.

## **Statement Regarding Oral Argument**

Valadez did not request argument in his petition. The court indicated oral argument would not be entertained upon granting the petition.

## **Questions Presented for Review**

**I. Whether prior possession and use of contraband may be admitted to prove knowledge of contraband and intent to possess contraband under Rules 403 and 404(b) of the Texas Rules of Evidence.**

**II. Whether prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to rebut the defensive theory that the defendant lacked knowledge of the presence of contraband.**

**III. Whether prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to prove the identity of the person who possessed the contraband.**

**IV. Whether prior possession and use of contraband may be admitted under the doctrine of chances.<sup>1</sup>**

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<sup>1</sup> These questions for review are based on the four granted grounds for review in PD-1247-18. *Work v. State*, 2018 WL 2347013 (Tex. App. – Austin 2018, pet. granted). The defendant’s petition in *Work* was granted on January 30, 2019. The petition in *Work* was submitted with oral argument on June 5, 2019, and remained under submission before the court at the time Valadez’s petition was filed. The court subsequently affirmed the judgment of the court of appeals in *Work* in an unpublished opinion delivered November 4, 2020. *Work v. State*, 2020 WL 6483888 (Tex. Crim. App. 2020).

## **Statement of Facts**

The indictment alleges that on March 8, 2012, Valadez intentionally or knowingly possessed a usable quantity of marihuana in an amount of 50 pounds or less, but more than five pounds (CR 6).

On March 8, 2012, Department of Public Safety (DPS) Trooper Juan Rodriguez was on patrol on Interstate 35 south of Waco (5 RR 31). He pulled over a tan Cadillac traveling northbound toward Waco because the window tinting on the front windows was too dark (5 RR 31).<sup>2</sup> The Cadillac was occupied by three men (5 RR 35). Jose Aguillon was the driver; Johnny Penaloza was in the front passenger seat; and Valadez was in the backseat (5 RR 39 and 40).

Rodriguez approached the front passenger window which was rolled down (5 RR 35). He smelled marihuana (5 RR 35). He could not tell whether he smelled burnt or fresh marihuana (5 RR 45).

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<sup>2</sup> See TEX. TRANSP. CODE § 547.613(b)(1) and (2) (proscribing impermissible window tinting).

Rodriguez told both Aguillon and Penaloza to exit the car and stand in the bar ditch next to the highway (5 RR 39). Aguillon was nervous when speaking with Rodriguez (5 RR 39). When asked by Rodriguez, Penaloza had no explanation to offer concerning the presence of marihuana crumbs on the short pants Penaloza was wearing (5 RR 39).

When a second trooper arrived, Valadez was ordered out of the car to join the others in the bar ditch (5 RR 45). In response to questions, Valadez was nervous and evasive concerning where the trio was going in the car (5 RR 47). Valadez eventually told Rodriguez the men were on the way to visit some women Aguillon knew in Waco (5 RR 49). Unlike the other two occupants of the car, Rodriguez's offense report makes no mention of acts of deception or nervousness by Valadez before or after his arrest (5 RR 90).

With the second trooper keeping an eye on the three men in the bar ditch, Rodriguez searched the Cadillac (5 RR 50). He found loose marihuana crumbs (shake) and burned marihuana cigarette butts (roaches) in plain view in the front passenger area (5 RR 50, 62). In the backseat, he found a utility door in the

armrest which gave access to the trunk (5 RR 51). When he opened the utility door, the smell of marihuana grew stronger (5 RR 51). Rodriguez opened the trunk and found two duffle bags which contained seven packaged bundles of marihuana (5 RR 56). After the vehicle was transported to a DPS office in Waco, two additional bundles of marihuana were found in the spare tire well (5 RR 56, 8 RR SX 5 A-I). Seven of the nine bundles in the duffle bags were accessible from the backseat through the utility door to the trunk area (5 RR 98). The bundles were wrapped in several layers of cellophane (5 RR 78).

A dashcam video from Rodriguez's patrol vehicle was admitted into evidence and published at trial (5 RR 60, 64, 8 RR SX 2). The three Cadillac occupants and the suspect vehicle were transported to a DPS office in Waco (5 RR 74).

Steven Royal, a DPS trooper, assisted Rodriguez on the roadside following the stop of the Cadillac (5 RR 115). A dashcam video from Royal's patrol vehicle was admitted into evidence and published at trial (5 RR 118, 8 RR SX 3). None of the men seemed surprised when the marihuana was found in the trunk of the

Cadillac (5 RR 122). The three men were deceptive in their responses to law enforcement while on the roadside (5 RR 125). Penaloza was later convicted on his plea of guilty to possession of the marihuana found in the Cadillac (5 RR 122).

Chris Dale, an investigator with DPS, spoke with each of the men in an effort to determine the source of the marihuana and the distribution plan for the marihuana (5 RR 143). None were willing to tell Dale where the marihuana was being taken (5 RR 143). All of the men said they were on a trip from Austin to meet some women in Waco (5 RR 147).

Both Valadez and Penaloza denied possessing or knowledge of the marihuana (5 RR 145). In speaking with Dale, Aguillon would neither confirm nor deny his connection to the marihuana (5 RR 145).

Valadez stipulated to a DPS controlled substance analysis laboratory report which was admitted into evidence without objection (5 RR 8, 14, 8 RR SX 4). The report reflects the nine bundles recovered from the trunk contained marihuana with a net weight of 18.15 pounds (8 RR SX 4).

Steve January, of the McLennan County Sheriff's Office, is a fingerprint expert (5 RR 184). January compared a known fingerprint from Valadez and found it matched a fingerprint on a 2009 judgment reflecting Valadez was convicted of possession of more than two ounces and less than four ounces of marihuana in Travis County (5 RR 182).

Christopher Thomas is a detective with the Austin Police Department (APD) (5 RR 190). A search of APD records reflects six previous cases in which Valadez had some connection with marihuana (5 RR 191). Thomas had no personal knowledge of the six cases (5 RR 201). He did not speak with the officers involved and simply testified to what an APD computer search revealed concerning Valadez's connection to six previous marihuana cases investigated by APD (5 RR 201).

Thomas did have personal knowledge of a 2014 incident in which he and another officer stopped a car Valadez was driving because he ran a stop sign (5 RR 192). Upon approaching the car, the officers smelled burned marihuana, saw Valadez smoking, and saw loose marihuana in the car (5 RR 193). In addition to

the loose marihuana, a search of the car revealed 27.6 grams of cocaine concealed in a cigarette holder (5 RR 196). The amount of cocaine was such that Thomas believed it was for distribution rather than personal use (5 RR 196). The State rested (5 RR 208).

Valadez called the driver, Aguillon, to testify (5 RR 213). Aguillon was convicted in this case following his plea of guilty and sent to prison (5 RR 213).

Aguillon and Penaloza owned the marihuana found in the trunk (5 RR 214).

Valadez knew nothing about the marihuana in the trunk (5 RR 215). Valadez simply came along on the trip to Waco to see some women Aguillon knew (5 RR 218). Aguillon and Penaloza bought the marihuana in Austin for \$5,000.00 and intended to sell it in Waco for \$8,500.00 (5 RR 235).

The defense rested and both sides closed (6 RR 5). The charge was read to the jury (6 RR 11). Argument was presented (6 RR 21, 27, and 36). The jury returned a verdict finding Valadez guilty as charged in the indictment (6 RR 43).

Valadez filed both a motion for community supervision and an election for the jury to assess punishment (CR 37 and 39). Consequently, punishment was tried to the jury (7 RR).

The State introduced evidence showing Valadez's prior convictions for possession of less than two ounces of marihuana, domestic violence assault, resisting arrest, and evading arrest (7 RR 9, 8 RR SX 10 – 14).

Bobby Brown is Valadez's supervisor at work and testified Valadez is a good employee (7 RR 15). Anthony Gonzales is Valadez's neighbor and testified Valadez often helps him around his house and drives him to medical appointments (7 RR 24). Liliana Valadez is Valadez's sister and testified that her brother is a good father to his infant son (7 RR 31).

The defense rested on punishment and both sides closed (7 RR 42). The charge was read to the jury (7 RR 43). Argument was presented (7 RR 51, 54, and 60). Punishment was assessed by the jury at five years and a fine of \$8500.00 (CR 95 and 7 RR 63). The jury did not recommend community supervision (CR 95 and 7 RR 63). Valadez was sentenced in open court (7 RR 64).

## **Summary of the Argument**

The trial court admitted Valadez's drug history and prior use and possession of contraband under three theories: intent, knowledge, and rebuttal of a defensive theory. The extraneous evidence proved nothing more than Valadez must have knowingly possessed the marijuana in the trunk because he is a habitual marijuana possessor with a prior history of drug possession. None of this evidence was relevant to any contested issue and none can be justified on a non-propensity basis. Thus, the trial court should have excluded the evidence. The court of appeals sanctioned the error upon affirming the conviction.

The State never offered the doctrine of chances as a theory of admissibility to the trial court and the trial court did not admit the evidence under this doctrine. This argument should not have been considered by the court of appeals because it was brought for the first time on appeal. Even if it were considered, the doctrine is inapplicable to the circumstances of this case and would fail due to the absence of highly unusual circumstances other than the repeated possession of marijuana.

If the evidence could be admitted under Rule 404(b), the trial court should have excluded it under Rule 403. The State had no need for this evidence. The evidence confused Valadez's familiarity with illegal drugs with the question of whether he was aware of the marijuana in the trunk of the Cadillac. In this

confusion, the evidence misled the jury to focus not on the evidence of Valadez's guilt, but his propensity for drug use and his character as a drug possessor. Rule 403 forecloses these improper bases for finding guilt. The court of appeals sanctioned the error upon affirming the conviction.

Finally, Valadez argues the errors were harmful. In the spirit of judicial economy, this court should consider the question of harm and ultimately remand the case to the trial court.

## **Argument in Support of Questions for Review**

### **I. The Rule 404 errors<sup>3</sup>**

Still in its case-in-chief, the State notified the trial court of its intent to offer eight extraneous marijuana offenses and a possession of cocaine with intent to deliver extraneous offense in response to Valadez's defensive theory of lack of intent or knowledge (5 RR 161). Valadez objected to the admissibility of the evidence under TEX. R. EVID. 404 (5 RR 163). He argued the extraneous offenses were not relevant and inadmissible because they were not similar to the charged offense (5 RR 167). The trial court found the extraneous offenses admissible on the issues of intent and knowledge, and to rebut the defensive theory that Valadez

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<sup>3</sup> These claims were presented in nine points of error to the court of appeals (Appellant's brief at 25 – 35).

was simply an innocent passenger in the Cadillac (5 RR 172). A running objection to the admission of the evidence was granted (5 RR 182).

The State proceeded to put on evidence of the eight extraneous marihuana offenses and the possession of cocaine offense. Deputy January testified Valadez had a 2009 prior conviction from Travis County for possession of more than two and less than four ounces of marihuana (5 RR 187).<sup>4</sup> Detective Thomas testified that Austin Police Department records reflect six instances in which Valadez had been “handled-by” APD in relation to marihuana offenses (5 RR 191). Thomas also testified that in 2014 Valadez was found smoking marihuana in an automobile after he was stopped for a traffic violation (5 RR 193). In addition to the marihuana, a search of Valadez’s car by Thomas revealed 27.6 grams of cocaine concealed in a cigarette ash holder (5 RR 196). The amount of cocaine was such that Thomas believed it was for distribution rather than personal use (5 RR 196).

Valadez argues the nine extraneous offenses were inadmissible under TEX. R. EVID. 404. In particular, the extraneous offenses were inadmissible because they were not shown to have characteristics in common with the offense for which Valadez was on trial.

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<sup>4</sup> There is no indication this conviction was for an offense investigated by APD which would have been included in Thomas’ list of offenses “handled-by” APD.

The admission of extraneous-offense evidence under Rule 404(b) is reviewed under an abuse of discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009); *Knight v. State*, 457 S.W.3d 192, 201 (Tex. App.–El Paso 2015, pet. ref'd). A trial court does not abuse its discretion if the decision to admit or exclude the evidence is within the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990); *Knight*, 457 S.W.3d at 201. A trial court's determination typically falls within the zone of reasonable disagreement if the evidence shows that the extraneous transaction is relevant to a material, non-propensity issue. *Montgomery*, 810 S.W.2d at 389.

As a general rule, all relevant evidence is admissible. TEX. R. EVID. 402 (making all relevant evidence admissible unless otherwise provided). Evidence is generally admissible if has any tendency to make a fact of consequence to the case more or less probable than it would be without the evidence. TEX. R. EVID. 401 (defining “relevant” evidence). Rule 404 provides an exception to this general rule: although relevant, “[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.” TEX. R. EVID. 404(b)(1).

In a criminal case, evidence of a crime, wrong, or other act may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. TEX. R. EVID. 404(b)(2); *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004); *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003); *Knight*, 457 S.W.3d at 202. A party may introduce extraneous-offense evidence that has relevance apart from its tendency to prove character conformity (1) where it logically serves to make more probable or less probable an elemental fact or an evidentiary fact that inferentially leads to an elemental fact, (2) where it serves to make more probable or less probable defensive evidence that undermines an elemental fact, or (3) where it rebuts a defensive theory. *Montgomery*, 810 S.W.2d at 387, 388.

The trial court has no discretion to admit extraneous-offense evidence only when it has no relevance apart from character conformity. *Id.* Extraneous-offense evidence is relevant and admissible when it logically serves as proof of intent or knowledge beyond its tendency to prove character conformity. *Id.* Admissibility is subject to the trial court's discretion to exclude it if its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403. *Id.* at 389; *Knight*, 457 S.W.3d at 204; TEX. R. EVID. 403 (allowing the court to exclude relevant evidence if its probative value is substantially outweighed by the danger

of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence).

Admissibility of an extraneous offense as circumstantial evidence of intent is a case-specific determination. *See Cantrell v. State*, 731 S.W.2d 84, 90 (Tex. Crim. App. 1987). The relevance of the extraneous offense must be analyzed within the contexts of facts and circumstances of the individual case in order to determine admissibility. *Id.* For the determination of relevancy, the factors of remoteness and similarity are important, not in and of themselves, but only as they bear on the relevancy and probative value of the offered extraneous offenses. *Plante v. State*, 692 S.W.2d 487, 491 (Tex. Crim. App. 1985).

The State is allowed to offer in rebuttal extraneous-offense evidence if the extraneous offense has characteristics in common with the offense for which the defendant was on trial. *Knight*, 457 S.W.3d at 202; *see Richardson*, 328 S.W.3d 61, 71 (Tex. App. – Fort Worth 2010, pet. ref'd). Thus, extraneous-offense evidence is relevant and admissible if it shares common characteristics with the charged offense and logically makes the elemental facts of intent and knowledge more or less probable, and further makes defensive evidence, which attempted to undermine those elemental facts, more or less probable. *See, e.g., Powell v. State*, 5 S.W.3d 369, 374, 383 (Tex. App.–Texarkana 1999, pet. ref'd)(subsequent

extraneous-offense was admissible under Rule 404(b) where the defendant on trial for possession with intent to distribute cocaine claimed the car he was driving did not belong to him and a subsequent, almost identical offense, occurred a few weeks after the offense being tried on the same stretch of highway, because the trial court could have reasonably concluded that this subsequent act tended to make more probable the allegation that the defendant intended to deliver the cocaine involved in the present offense).

Here, none of the prior instances of Valadez's involvement with marihuana or cocaine were shown to the jury to have common characteristics with the offense charged in the indictment. The single marihuana incident in which the details were shown to the jury by Thomas's testimony involved Valadez in a car, alone, and smoking marihuana. The cocaine incident as well involved Valadez alone in a car and included the additional allegation of intent to deliver. The wrongfully admitted evidence showed Valadez to be a habitual marihuana possessor and cocaine dealer. Such evidence was inadmissible under TEX. R. EVID. 404(b) on the issues of intent, knowledge, or to rebut the innocent passenger defense in the instant prosecution. The erroneous admission of the extraneous offenses allowed the jury to convict Valadez as a criminal in general with a penchant for marihuana and dealing cocaine. That was wrong.

## II. The Rule 403 errors<sup>5</sup>

Still in its case-in-chief, the State notified the trial court of its intent to offer eight extraneous marihuana offenses and a possession of cocaine with intent to deliver extraneous offense in response to Valadez's defensive theory of lack of intent or knowledge (5 RR 161). Valadez objected to the admissibility of the evidence under TEX. R. EVID. 403 (5 RR 163).<sup>6</sup> The State conceded the cocaine

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<sup>5</sup> These claims were presented in nine points of error to the court of appeals (Appellant's brief at 35 – 43).

<sup>6</sup> Among the factors Valadez asked the court to consider in its Rule 403 analysis was the fact the cocaine case was pending in Travis County and had not yet been adjudicated (5 RR 167). The prosecutor responded that it was not necessary to wait for some out of county court with a clogged docket to decide the case before presenting evidence of the cocaine offense (5 RR 169 – 170).

By way of information and not argument, Valadez would inform the court that four months after the instant trial, he was acquitted of the possession of cocaine with intent to deliver offense following his plea of not guilty in a trial before the court in *State of Texas v. Adrian Valadez*, No. D-1-DC-14-206164, in the 450<sup>th</sup> Judicial District Court of Travis County, Texas.

Evidence of an extraneous offense for which a defendant has been acquitted has, generally, been held to be inadmissible under the double jeopardy clauses of the federal or state constitution and under the principle of collateral estoppel. *See Stuart v. State*, 561 S.W.2d 181, 182 (Tex. Crim. App. 1978) (holding that under double jeopardy clauses of federal and state constitutions, evidence of offense for which defendant was acquitted could not be admitted as evidence of extraneous offense); *Kerbyson v. State*, 711 S.W.2d 289, 290 (Tex. App.—Dallas 1986, pet. ref'd) (holding that offense for which defendant had been tried and acquitted would not be admissible at subsequent trial as extraneous offense).

offense might be excludable under Rule 403 (5 RR 165 - 166).<sup>7</sup> The trial court found the extraneous offenses admissible because their probative value would not be substantially outweighed by the danger of unfair prejudice (5 RR 171). The trial court overruled Valadez's Rule 403 objection (5 RR 181). A running objection to the admission of the evidence was granted (5 RR 182).

The State proceeded to put on evidence of the eight extraneous marihuana offenses and the possession of cocaine with intent to deliver offense. Deputy January testified Valadez had a 2009 prior conviction from Travis County for possession of more than two and less than four ounces of marihuana (5 RR 187). Detective Thomas testified that Austin Police Department records reflect six instances in which Valadez had been "handled-by" APD in relation to marihuana offenses (5 RR 191). Thomas also testified that in 2014 Valadez was found smoking marihuana in an automobile after stopping him for a traffic violation (5 RR 193). In addition to the marihuana, a search of Valadez's car by Thomas revealed 27.6 grams of cocaine concealed in a cigarette ash holder (5 RR 196).

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<sup>7</sup> Perhaps that short lived concession was on the realization the cocaine case involved a different substance, an intent to deliver, of questionable relevance, and was a first degree felony in this third degree felony prosecution. *See* TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D)(i) and 481.112(d) (recognizing cocaine as a Penalty Group 1 controlled substance and possession of 4 to 200 grams with intent to deliver as a first degree felony).

The amount of cocaine was such that Thomas believed it was for distribution rather than personal use (5 RR 196).

Valadez argues the nine extraneous offenses were inadmissible under TEX. R. EVID. 403. In particular, the extraneous offenses were inadmissible because their probative value was substantially outweighed by the danger of unfair prejudice to Valadez.

Even when an extraneous offense is relevant apart from its tendency to prove character conformity, before it is admissible to the jury, the court must consider whether the relevance of the evidence for other purposes is substantially outweighed by the extraneous offense's inflammatory or prejudicial potential. *Montgomery*, 810 S.W.2d at 387. The trial court overruled Valadez's objection based on TEX. R. EVID. 403 (5 RR 181). Because Valadez claimed prejudice from the admission of "other crime, wrong, or act" evidence, the trial court was called upon to weigh the probative value of such evidence against its potential for unfair prejudice, that is, its tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. *Montgomery*, 810 S.W.2d at 389.

In order for the trial court to conduct the *Montgomery*/Rule 403 balancing test, it was called upon to consider four factors, to-wit:

(1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable—a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;

(2) the potential the other offense evidence has to impress the jury “in some irrational but nevertheless indelible way”;

(3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; [and]

(4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute. *Montgomery*, 810 S.W.2d at 389-90.

Valadez maintains that upon careful examination and review, the court of appeals should have found the trial court abused its discretion upon undertaking and resolving the Rule 403 balancing analysis.

### **First factor—Degree of Relevance and Strength of Evidence**

In this case, Valadez continues to maintain the extraneous drug acts were not relevant to an issue in the case. The evidence did not serve to make a fact of consequence to the possession of marihuana for which he was charged more or less

probable. None of the extraneous marihuana acts involved the quantity of marihuana involved in the instant cause. None of the prior drug acts involved an allegation of joint possession. The previous cocaine act involved an entirely different substance and an allegation of intent to deliver. The indictment in the instant cause alleged no intent to deliver the marihuana. Valadez submits the admission of the evidence violated the first *Montgomery* factor.

### **Second factor—Irrational, Indelible Impression**

This factor focuses on the impact that “other crime, wrong, or act” evidence can and will have on the thought processes of the jurors. In this case there was a seemingly unending parade of “other crime, wrong, or act” evidence. There was “other crime, wrong, or act” evidence about nine distinct acts of misconduct involving marihuana or cocaine. Evidence of this nature would most assuredly “impress the jury in some irrational and indelible way,” and the court in *Montgomery* expressed its overriding concern about such a dangerous impression. The trial court failed to recognize that this unprecedented presentation of “other crime, wrong, or act” evidence was sure to impress the jury in some “irrational” and “indelible way.” Indeed, this was exactly what the court in *Montgomery* feared, and, to be sure, the court hoped that the trial courts in this State would take every precautionary measure to prevent such a malady.

The trial court did not instruct the jury on the limited issues for which the extraneous acts of misconduct were admitted. The jury was not told the extraneous acts had to be proven beyond a reasonable doubt before they could be considered by the jury. Valadez maintains the state of the evidence is such that the jury could have returned a guilty verdict because it believed Valadez was a cocaine dealer and a habitual possessor of marihuana. Such would have been an irrational use of the extraneous offense evidence by the jury.

### **Third factor—Time Needed**

This factor focuses on the amount of time involved in the presentation of “other crime, wrong, or act” evidence. Indeed, in this case, the amount of time was significant. The trial court is required to consider whether such “other crime, wrong, or act” evidence would take so much time that the jury would or could be “distracted from the consideration of the indicted offense.” Here, the trial court failed to do so.

The State’s case was as much about “other crime, wrong, or act” evidence as it was about the indicted offense. Here, the record reveals that the State spent a substantial portion of the trial proving up the other crimes, wrongs, and acts, by Valadez. The record reflects that two of the five State’s witnesses (40%) were called by the State to prove extraneous drug acts by Valadez. Because of the

disproportionate volume of the trial required to present the “other crime, wrong, or act” evidence the jurors were dangerously distracted from their duty, responsibility, and oath. See *McGregor v. State*, 394 S.W.3d 90, 121-22 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2012, pet. ref’d) (holding factor weighed in favor of exclusion when evidence of extraneous offense amounted to approximately thirty-three percent of trial time); *Newton v. State*, 301 S.W.3d 315, 320-21 (Tex. App.—Waco 2009, pet. ref’d) (same, twenty-seven percent); *Russell v. State*, 113 S.W.3d 530, 545-46 (Tex. App.—Fort Worth 2003, pet. ref’d) (same, thirty percent).

#### **Fourth factor—State’s Need**

Of course, the State always needs as much “other crime, wrong, or act” evidence as the court will dare admit, and, obviously, in this case, the State’s need was apparently in the trial court’s mind most grave. Still, the strength or weakness of the State’s case does not justify the *carte blanche* admission—as in this case—of “other crime, wrong, or act” evidence. Here, the testimony by Trooper Rodriguez showed the smell of marihuana permeated the interior of the Cadillac. The admission of all the “other crime, wrong, or act” evidence in this case went far beyond the State’s need to prove Valadez’s knowledge of the presence of the contraband in the automobile.

Valadez stood indicted for possession of marihuana, but during his trial there was a horde of “other crime, wrong, or act” evidence admitted by the trial court. Needless to say, this horde of “other crime, wrong, or act” evidence represented such a great portion of the State’s evidence that the resulting prejudicial impact was of such a magnitude that it defied any decent standard of fairness.

Consequently, Valadez maintains he did not receive a fair and impartial trial because the jury was inundated with so much “other crime, wrong, or act” evidence that the jury was unconsciously, unwittingly, and unfairly prejudiced against him. Valadez submits the trial court abused its discretion in conducting the Rule 403 balancing test and failing to exclude the evidence of other crimes, wrongs, and acts on the basis the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The court of appeals erred by finding no abuse of discretion.

### **III. The inapplicable doctrine of chances**

The State never offered the doctrine of chances as a theory of admissibility to the trial court and the trial court did not admit the evidence under the doctrine. Nevertheless, in rejecting the complaints presented by Valadez, the court of appeals found the extraneous conduct admissible under the doctrine. *Valadez*, slip

op. at 17 – 18. Valadez argues the doctrine is inapplicable to the circumstances of this case and cannot serve as a vehicle for admissibility.

To establish intent, the State can introduce other transactions involving the defendant. *Plante*, 692 S.W.2d at 490. Where the material issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extraneous offense derives purely from the point of view of the doctrine of chances. *Id.* at 491 (quoting Wigmore, *Evidence* § 302 (Chadbourn rev. ed. 1979)). The doctrine of chances represents the instinctive recognition that each repeated occurrence of a similar act by the same party increases the likelihood that the act was intentional and not chance or accidental. *See id.*; *De La Paz*, 279 S.W.3d at 347 (noting the doctrine of chances tells us that highly unusual events are unlikely to repeat themselves inadvertently or by happenstance).

Here, the extraneous conduct when compared to the charged conduct was not shown to include highly unusual events unlikely to repeat themselves inadvertently or by happenstance. None of the extraneous marihuana acts involved the quantity of marihuana involved in the instant cause. None of the prior drug acts involved an allegation of joint possession. The previous cocaine act involved an entirely different substance and an allegation of intent to deliver. The indictment in the instant cause alleged no intent to deliver the marihuana.

At most, the extraneous conduct showed Valadez to be a serial possessor of controlled substances. That fact alone should not be sufficient for the doctrine of chances to serve as a means to admissibility of the extraneous conduct.

#### **IV. The flawed court of appeals' analysis**

The questions for review concern the manner in which the court of appeals addressed Valadez's points of error complaining of the admission of nine extraneous drug offenses. Valadez complained on appeal that the extraneous offenses were little more than propensity evidence portraying him as a serial drug possessor. Seemingly agreeing with Valadez, the court of appeals found the extraneous offenses admissible to prove knowledge, intent, rebut his innocent passenger defense, and under the doctrine of chances. Valadez argues none of those theories support admissibility.

Valadez was a passenger in an automobile stopped for a window-tint violation. He was prosecuted for 18 pounds of marijuana found in the trunk of the automobile. In its case in chief, the State introduced evidence of nine extraneous drug offenses. Eight of the extraneous offenses involved marijuana possession and one involved possession of cocaine.

By the time Valadez was tried, the driver of the automobile had already pled guilty to possessing the marijuana found in the trunk. At Valadez's trial, the driver testified Valadez did not know of the marijuana in the trunk.

On direct appeal, in nine points of error, Valadez complained the nine extraneous drug offenses were inadmissible over counsel's TEX. R. EVID. 404(b) objection (Appellant's brief at 25 – 35). The trial abused its discretion finding the extraneous offenses admissible to prove intent, knowledge, or rebut Valadez's innocent passenger defense. The extraneous offenses were inadmissible for the purposes stated by the trial court. None of the prior instances of Valadez's involvement with marihuana or cocaine were shown to the jury to have common characteristics with the offense charged in the indictment. The single marihuana incident in which the details were shown to the jury involved Valadez alone in a car smoking marihuana. The cocaine incident as well involved Valadez alone in a car and included the additional allegation of intent to deliver. The wrongfully admitted evidence portrayed Valadez to the jury to be a habitual marihuana possessor and cocaine dealer. The court of appeals found no abuse of discretion upon concluding the extraneous offenses were admissible to prove knowledge, intent, rebut the innocent passenger defense, and under the doctrine of chances. *Valadez*, slip op. at 16 – 17.

On direct appeal, in nine points of error, Valadez complained the same nine extraneous drug offenses were inadmissible over counsel's TEX. R. EVID. 403 objection (Appellant's brief at 35 - 43). In particular, the extraneous offenses were inadmissible because their probative value was substantially outweighed by the danger of unfair prejudice to Valadez in the trial of the charged offense. Valadez maintained that upon careful examination and review of the relevant Rule 403 considerations, the court of appeals should find the trial court abused its discretion when undertaking the Rule 403 balancing analysis and admitting the complained of evidence. The court of appeals found no abuse of discretion upon concluding the extraneous offenses were admissible to prove knowledge, intent, possession in the instant case, and rebut the innocent passenger defense. *Valadez*, slip op. at 20.

The trial court admitted Valadez's drug history and prior use and possession of contraband under three theories: knowledge, rebuttal, and intent. The extraneous evidence proved nothing more than Valadez must have knowingly possessed the marijuana in the trunk because he has a prior history of drug possession. None of this evidence was relevant to any contested issue and none can be justified on a non-propensity basis. Thus, the trial court should have excluded the evidence and the court of appeals erred by finding no abuse of discretion in the admissibility of the extraneous offense evidence over Valadez's Rule 404 objection at trial.

The State never offered the doctrine of chances as a theory of admissibility to the trial court and the trial court did not admit the evidence under this doctrine. Insofar as the Court of Appeals relied on this doctrine, this theory of admissibility only applies to highly unusual events that are unlikely to repeat themselves inadvertently or by happenstance. *De La Paz*, 279 S.W.3d at 347. The State must establish this abnormality. *Martin v. State*, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005). Personal drug abuse, in and of itself, hardly meets the showing of highly unusual events required for this theory of admissibility. The doctrine is inapplicable to the circumstances of this case.

Finally, even if the evidence could be admitted under Rule 404(b), the trial court should have excluded it under Rule 403. The State had no need for this evidence. The evidence confused Valadez's familiarity with illegal drugs with the question whether he was aware of the marijuana bundles in the trunk. In this confusion, the evidence misled the jury to focus not on the evidence of Valadez's guilt, but his propensity for drug use and possession. Rule 403 forecloses these improper bases for finding guilt. The court of appeals erred by finding no abuse of discretion in the admissibility of the extraneous offense evidence over Valadez's Rule 403 objection at trial.

## **V. The harm of it all**

On direct appeal, Valadez argued his substantial rights were adversely affected by the Rule 403 and Rule 404 errors (Appellant's brief at 31-35 and 43). No gratuitous TEX. R. APP. P. 44.2(b) harm analysis was undertaken by the court of appeals upon finding no abuse of discretion in the admission of the extraneous offense evidence over the TEX. R. EVID. 403 and 404 objections at trial.

Valadez acknowledges it is generally appropriate for the court of appeals to make an initial harm determination due to the erroneous admission of evidence. *See Pawlak v. State*, 420 S.W.3d 807, 808 (Tex. Crim. App. 2013); *Fuller v. State*, 363 S.W.3d 583, 589 (Tex. Crim. App. 2012). Nevertheless, Valadez would urge this court, in the spirit of judicial economy, to proceed with determination of harm from the complained of errors. As discussed below, the record contains a wealth of information showing Valadez's substantial rights were adversely affected by the Rule 403 and Rule 404 errors. *See Davison v. State*, 405 S.W.3d 682, 691–92 (Tex. Crim. App. 2013) (observing that there are rare exceptions to the court's institutional practice of reviewing only decisions of the courts of appeals, one of which is that when the proper resolution of any remaining appellate issue is clear, the court may exercise its discretion to resolve that issue itself, in the name of judicial economy).

Error under the rules of evidence in the admission of evidence constitutes nonconstitutional error. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). A reviewing court is to disregard nonconstitutional error that does not affect the substantial rights of the defendant. TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In *Kotteakos*, the United States Supreme Court explained:

“[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.” 328 U.S. at 765.

The Supreme Court has defined “grave doubts” to mean “in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.” *Webb v. State*, 36 S.W.3d 164, 182 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2000, pet. ref’d). If the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, that is, as having a substantial and injurious effect or influence in determining the jury's verdict. *Id.*

The defendant is not required to prove harm from an error. *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). Indeed, there ordinarily is no way to prove “actual” harm. *Id.* It is instead the duty of the reviewing court to assess harm from the context of the error. *Id.* Thus, the proper inquiry is whether the trial court's error in allowing the State to introduce evidence of other crimes, wrongs, and acts by Valadez substantially swayed or influenced the jury's verdict, or whether this Court is left in grave doubt as to whether this extraneous offense evidence substantially swayed or influenced the jury's verdict. *See Kotteakos*, 328 U.S. at 765; *Johnson*, 43 S.W.3d at 4. In making that determination, this Court should consider the trial court's erroneous admission of the extraneous offense evidence in the context of the entire record and not just whether there was sufficient or overwhelming evidence of Valadez’s guilt. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

Here, the record reveals that the State spent a substantial portion of the trial proving up the other crimes, wrongs, and acts by Valadez. Two of the five witnesses called by the State at the guilt or innocence phase of trial were for the purpose of proving extraneous conduct by Valadez (5 RR 182 and 190).

Sufficiency of the evidence to support a conviction is one of the factors to be considered in conducting a TEX. R. APP. P. 44.2(b) harm analysis. *Motilla*, 78

S.W.3d at 356-57. Valadez argued on appeal the evidence at trial was insufficient to affirmatively link him to the contraband in the trunk. Extraneous offense evidence can have a devastating impact on the jury's rational disposition towards other evidence because of the jury's natural inclination to infer guilt to the charged offense from the extraneous offenses. *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994). Here, the erroneous admission of the other crimes, wrongs, and acts was of such a magnitude that in all probability it disrupted the jury's orderly evaluation of the evidence and had a devastating impact on the jury's rational disposition towards other evidence. The natural inclination of the jury was to infer Valadez's guilt in the charged offense because he was portrayed as a criminal in general due to his other marihuana and cocaine activities.

No limiting instruction was given to the jury upon admission of the challenged evidence and the jury was free to believe that it could consider the extraneous-offense evidence to show Valadez acted in conformity with his past character (5 RR 182). Despite a request by Valadez joined in by the State, no limiting instruction was given in the court's charge to the jury at the conclusion of the guilt or innocence phase of trial (6 RR 6-9). The jury was not even required to find the extraneous conduct beyond a reasonable doubt before considering it against Valadez in the instant cause (CR 77). The absence of a limiting charge

exacerbated the error and gave the jury a virtual blank check to find Valadez guilty because of his prior trouble with the law.

The State repeatedly made use of the improperly admitted evidence in jury argument when urging the jury to convict. The State argued: “and that's why we brought you the Austin PD detective, to prove to you that this defendant has had experience with marihuana before and since this offense” (6 RR 21); “we know he knows what it [marihuana] smells like” (6 RR 25); “we know he knows what it [marihuana] smells like” (6 RR 26); and

we talk about knowing when someone is lying, you heard from Detective Thomas and from Trooper Rodriguez, who has done this job over a decade each, knowing full well when they are being deceived on the roadside. It's not a superpower like Detective Thomas said. It's just something you develop professionally, just like you have to, that you develop this sense, and when the hunches come right, you know it's right. If anything, Detective Thomas had every reason in the world to go, "Well, I guess I shouldn't trust my own officer's training and experience. I shouldn't trust my own background. The guy says there is no drugs in the car, just like he says here. My partner didn't find any drugs. I guess there is no drugs. No, my gut says something else," and, sure enough, he walked in that car and he found exactly what he thought he would find, a big, old bundle, a distributor amount, of narcotics, just like we have in this case. We bring you those cases to show this guy knows what marihuana smells like -- there is no doubt -- and that any other story that we've been brought is unreasonable (6 RR 38).

After reviewing the entire record, this court will be unable to find with fair assurance that the erroneous admission of other crimes, wrongs, and acts did not

have a substantial and injurious effect or influence on the jury's verdict. In fact, considering the large volume of detailed inflammatory evidence presented to the jury about the extraneous criminal activities of Valadez the record reflects a likelihood that the extraneous matters did have a substantial influence on the jury's verdict. This court cannot say, with fair assurance, after considering the entire record without stripping it of the erroneous admission of the extraneous matters, that the judgment was not substantially swayed by the errors. The errors were harmful under TEX. R. APP. P. 44.2(b). Valadez should be awarded a new trial free of such errors.

### **Prayer**

WHEREFORE, PREMISES CONSIDERED, Adrian Valadez prays this court will reverse the judgement by the court of appeals and remand to the trial court for a new trial or enter any other relief appropriate under the facts and the law.

Respectfully submitted,

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### **Certificate of Compliance**

This pleading complies with TEX. R. APP. P. 9.4. According to the word count function of the computer program used to prepare the document, the brief contains 7,426 words excluding the items not to be included within the word count limit.

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### **Certificate of Service**

This is to certify a true and correct copy of this pleading was served on and emailed to Counsel for the State of Texas, Sterling Harmon, Assistant Criminal District Attorney, at his email address maintained at Sterling.Harmon@co.mclennan.tx.us and the State Prosecuting Attorney, at her email address of information@spa.texas.gov on this the 19<sup>th</sup> day of March, 2021.

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